INDEX.

PAGE

Respondent's Statement of the Case 1

Did the Trustees do anything more than was required of them by a pre-existing legal duty to RFC?... 2

There was both consideration for and action in reliance upon Mr. Jones' promise 6

Was the Circuit Court of Appeals justified in refusing to determine what law is applicable and to give effect to the New York Statute, because there had been no "intervening decision", or because of its "discretion"? 12

Do counsel for RFC really doubt, and can this Court for a moment doubt, that the trustees for creditors "agreed" to the reduction of interest so many times promised? 15

Application of Section 122 of the Negotiable Instruments Law, Cahill's N. Y. Cons. L., Ch. 39, § 203. 18

Is a federal corporation like RFC bound, like the men with whom it does business, by the statutes and other commercial laws of the State in which the business is done? Is such a corporation bound, as other men would be, by contracts made with trustees in bankruptcy? 20

TABLE OF CASES CITED:

PAGE

Allegheny College v. *Nat. Chautauqua Co. Bank*, 246 N. Y. 369 (1927) 10

Bank of U. S. v. *Manheim*, 264 N. Y. 45 (1934) 19
Bank of the U. S. v. *Tyler*, 4 Pet. 366 (1830) 22

Clearfield Trust Co. v. *U. S.*, 318 U. S. 363 (1943).... 24

DeCicco v. *Schweizer*, 221 N. Y. 431 (1917) 9, 10

Erie R. Co. v. *Tompkins*, 304 U. S. 64 (1938) 23

Glebe Sugar Ref. Co. v. *Trustees*, [1921] 2 A. C. 66..13, 18

Helvering v. *Clifford*, 309 U. S. 331 12
Hormel v. *Helvering*, 312 U. S. 552 (1941).....12, 14

Joint Council v. *D. L. & W. R. Co.*, 157 F. 2d 417 (1946) (CCA) 18

Leask v. *Dew*, 102 App. Div. 529, aff'd without opinion 184 N. Y. 599 20
Lowrey v. *Hawaii*, 206 U. S. 206 12

Mactier v. *Frith*, 6 Wend. 103 (1830) 19
Martin v. *Meles*, 179 Mass. 114 (1901) 11, 12
Moses v. *Lawrence Nat. Bank*, 149 U. S. 298 (1892).. 23
Murdock v. *Ward*, 178 U. S. 139 (1900) 18
M. V. T. Corp. v. *Mt. Vernon Lodge*, 263 App. Div. 849 (1941) 6

Pecheur Lozenge Co. v. *Nat'l Candy Co.*, 315 U. S. 666 (1942) 18
Petterson v. *Pattberg*, 248 N. Y. 86 (1928) 5, 6

Quincy & Co. v. *Cities Service Co.*, 156 Misc. 83 (1935), aff'd 253 App. Div. 719 6

Salinas v. *Salinas*, 187 Misc. 509, 62 N. Y. S. 2d 385 (1946), aff'd 67 N. Y. S. 2d 692 16
Sowell v. *Fed. Reserve Bank*, 268 U. S. 449 (1925)... 23

PAGE

Spector v. *National Cellulose Corp.*, 181 Misc. 465, 48 N. Y. S. 2d 234 (1943), aff'd 267 App. Div. 870, 47 N. Y. S. 2d 311 17

Thompson v. *Willson*, 183 Misc. 949, 51 N. Y. S. 2d 665 (1944), aff'd 269 App. Div. 829, 56 N. Y. S. 2d 415, appeal dismissed 269 App. Div. 937, 58 N. Y. S. 2d 352 16

U. S. v. *Standard Oil Co.*, U. S. , 67 S. Ct. 1604 (1947) 24

Vanston Bondholders Prot. Comm. v. *Green*, 329 U. S. 156 (1946) 25

Wanninger's Estate, In re, 34 N. Y. S. 2d 326 (1942) .15, 16

OTHER AUTHORITIES CITED:

Negotiable Instruments Law, Section 122, Cahill's N. Y. Cons., L. Ch. 39, § 203 .....7, 18, 19, 26

New York Pers. Prop. Law, Section 33(2) 7, 15, 18, 26

Restatement of Contracts:
Section 45 .....5, 6, 9, 21
Section 90 .....5, 6, 9, 21

Rules of Decision Act (Jud. Act 1789, § 34, 28 U. S. C. A. § 725) 22, 23

Texas Negotiable Instruments Law 23

Uniform Written Obligations Act of Pennsylvania... 27

Williston on Contracts (1st ed.):
Section 60 6
Section 139 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 642.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, as successor to Howard S. Palmer, James Lee Loomis and Henry B. Sawyer, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor,

Petitioner,

—against—

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

REPLY BRIEF OF PETITIONER.

Respondent's Statement of the Case.

The respondent's summary statement of the case is not inconsistent with the similar statement in the petitioner's application and brief. We here call attention, however, to a few omissions.

No reference is made by respondent to the loans of $4,800,000 made to the Debtor by PWA, bearing interest at only 4 per cent, loans that were later taken over by RFC. This is of importance since the express condition of Mr. Jones' promise was payment of the total claims of RFC in the reorganization. The performance of this condition required the Trustees, in order to earn the promised reduction from 5% to 4% on the original RFC notes, to procure the money

necessary to pay the PWA debt (already bearing interest at only 4%) as well as the RFC debt. The total amount due on the two loans was approximately $11,744,000, at the date of Mr. Jones' letter of 1938 (R., p. 228). This entire amount was paid in full before the end of reorganization.

No mention is made of the payments in cash procured by the Trustees for the above purpose, amounting to approximately $4,000,000, over and above the income on hypothecated collateral received by RFC. Indeed, no mention of these payments is made in respondent's entire brief, except on page 10 where it is asserted that they were not induced by Mr. Jones' letter for the reason that RFC was already entitled to them.

There is no reference to the fact that full payment in cash of all the claims of RFC, being full performance of the condition of Mr. Jones' promise, was received by RFC nearly a half year before the close of reorganization. This fact appears nowhere in respondent's brief.

Did the Trustees do anything more than was required of them by a pre-existing legal duty to RFC?

(Reply to respondent's argument numbered 1 in its brief, page 8.)

Mr. Jones' written promise reducing the rate of interest was a promise made to the Trustees, who were not parties to the notes held by RFC. The express condition of the promise was full payment of the claims in the reorganization.

In reliance on this promise and in performance of the express condition, the Trustees on seven occasions between August 22, 1939, and November 9, 1945, ob-

tained orders of the Bankruptcy Court permitting them to sell hypothecated collateral and to pay the proceeds in cash to RFC (R., pp. 194-221). The Trustees had no legal duty to file such petitions and make such sales. RFC had no right that such sales should be made, for the purpose of paying off its claims or otherwise. RFC could not itself have made such sales, being prevented by a general injunction issued by the Court early in the reorganization proceeding (R., pp. 121, 127, referring to Order No. 1, Court Rec. 5-12). So far from being under a duty to make such sales and payments, the Trustees were not even permitted to make them without an order of Court.

By virtue of these actions of the Trustees, RFC received in cash and applied on the principal debt during the process of reorganization nearly $2,000,000 which it would not otherwise have obtained and to which it otherwise had no legal right. These payments were in part performance of the express condition required by Mr. Jones.

It is therefore wholly immaterial that on cross-examination Vice-President Carmichael assented to a statement by counsel that "all the payments that have been made . . . have all represented income and proceeds of the pledged collateral." The *income* from collateral was collected and applied by RFC itself, in accordance with the Court's ruling in litigation with other creditors. With respect to the *proceeds from sales*, however, the situation was very different. RFC could not itself make such sales; and the Trustees were under no duty to cause them to be made.

The truth is, however, that Mr. Carmichael's statement was incorrect. The statement should have been "some but not *all* of the payments".

It appears in the brief filed by RFC with the Interstate Commerce Commission on August 1, 1939 (R., pp. 117, 121) that the Trustees held and owned "10,000 shares of Class B stock of the reorganized Connecticut Company", originally a subsidiary of the New Haven Railroad, and that the Trustees had [with Court consent] agreed to pay to RFC 70% of all dividends that might be received on said shares. These 10,000 shares were not themselves hypothecated to RFC and the Trustees were under no duty to cause such dividends to be declared. Nevertheless, by virtue of their voting control of the reorganized Connecticut Company, they did cause such dividends to be declared, and thereafter, in accordance with their agreement, they made payments of more than $1,800,000 to RFC. This does not appear in the printed record herein; but it is the fact. These payments were made neither from "income" nor from "proceeds" of pledged collateral. After declaration of the dividends on this Class B stock, it was the duty of the Trustees to pay 70% to RFC; but it was never the duty of the Trustees to cause the dividends to be declared.

Even without their payments of this dividend money, however, the action of the Trustees in acceleration of the sales of collateral, by petition and order of Court, and the payment of the proceeds so obtained, constituted a beneficial consideration for the promise of Mr. Jones, as well as part performance of the express condition of his promise.

The statement in respondent's reply brief at page 10: "Since RFC was unquestionably entitled to these payments in any event, they cannot be said to have been induced by the 1938 letter," is not substantiated by the facts. Instead, these payments cannot reasonably be said to have been induced by anything else.

since the Trustees were under no duty to RFC to make the sales and cause the dividend declarations that resulted in the cash payments.

Petterson v. *Pattberg*, 248 N. Y. 86 (1928), is cited as authority for the statement that a conditional offer may be withdrawn at any time prior to complete performance of the condition (Brief, p. 9). The Court made no such decision. In the case before it, there was not even a *part performance* of the condition. A mortgagee promised to accept a reduced amount on condition of full payment by a certain date. Before that date the mortgagor came to the creditor's door and knocked. Who is there, asked Pattberg without opening the door. "It is Mr. Petterson. I have come to pay off the mortgage," was the answer. To this, Pattberg at once said that he had already sold the mortgage. Not until thereafter was the door even opened.

Even on these facts, Judges Lehman and Andrews vigorously and effectively dissented; and the law reviews very generally disapproved the decision. The decision was made several years before the adoption of Restatement, Contracts. Chief Judge Cardozo, as member of the Council of the Institute, gave full assent to the applicable sections of the Restatement.

But not even a tender of payment had been made, before express notice of withdrawal. No one can read the two opinions in the case and have a doubt that Petterson would have won his case if before any revocation he had made and Pattberg had received a part of the requested money. The New York Court of Appeals has not disapproved Sections 45 and 90 of the Restatement; and it will not disapprove them.

Quincy & Co. v. *Cities Service Co.,* 156 Misc. 83 (1935), is cited by respondent along with *Petterson* v. *Pattberg.* The nisi prius judge in that case misinterprets the *Petterson* decision just as does the respondent; but he rested the decision in part upon another ground. Assuming that an operative "offer" had been made (which he regarded as doubtful) and assuming that it had been accepted before revocation (the holding being otherwise), the plaintiff still had no action based on the contract because he had actually received the shares of stock bargained for and had held them for two years without objection until stock values had vanished. The nisi prius judge cites as authority Sections 60, 60b, and 139 of the first edition of Williston on Contracts, disregarding the fact that as Reporter for the Institute Williston had himself drafted Sections 45 and 90 of the Restatement and induced their adoption. The discussion of the problem in the revised edition of Williston's great work is consistent with the Restatement. The decision was affirmed without opinion by the Appellate Division, 253 App. Div. 719.

M. V. T. Corp. v. *Mt. Vernon Lodge,* 263 App. Div. 849 (1941), also cited by respondent, merely says that the offer had been revoked before performance. There is no opinion; and whether there had been a part performance or a tender does not appear.

There was both consideration for and action in reliance upon Mr. Jones' promise.

(Reply to respondent's argument numbered 2, at page 11 of its brief.)

Your petitioner not only "seriously contends" but *confidently asserts* that the action of the Trustees was

both a sufficient consideration for Mr. Jones' promise and substantial action in reliance upon it. It is, indeed, unnecessary to determine which characterization of that action is the more appropriate, because it is sufficient in either aspect. Not the less so, for the reason that the statutes of New York (Sec. 33(2), Pers. Prop. Law and Sec. 122 N. I. L.) make the promise binding without either consideration or action in reliance. The arguments are cumulative; and all of them are separately sufficient.

However "unique" the knowledge of the district judge may have been, he wholly overlooked the petitions of the Trustees and their resulting sales and payments made in accordance with Court orders. They can not now be overlooked and their effect must be weighed. The attention of the Circuit Court of Appeals was specifically called to them; but it disposed of them by misinterpreting them as mere "efforts to do the best one could when one could."

The "efforts" of the Trustees in fact turned securities into *cash* and resulted in *payments,* made to and received by RFC, that extinguished all but a comparatively small balance of the debt. These "efforts" were made with the knowledge and participation of RFC. They were made at the request of Mr. Jones, a request reasonably to be implied in the words of his letter of December 21, 1938, standing alone, since it was on the express condition of payment in the reorganization. In addition thereto, such a request had earlier been put *in express terms* in his letter of advice and assurance dated September 28, 1936. By that letter Mr. Jones requested the Trustees to obtain a new Court

Order in lieu of Order No. 31, an order that should provide as follows:

"The Trustees will take all appropriate steps to render available to the Reconstruction Finance Corporation (a) all sums realized and available in cash since October 23, 1935, and applicable to the interest on and principal of advances assigned to said Corporation and any like sums which may be realized and available for such purposes in the future; (b) all interest, dividends and other income and all payments on account of principal accruing hereafter upon or in connection with any collateral other than said advances and which secures Debtor's notes held by said Corporation" (R., p. 27; orig. Brief, p. 14).

If it is necessary to probe so deeply into the springs and motives of the action of the Trustees and of Mr. Jones, in order to make effective a promise that ought to have been performed without any litigation whatever, the history of this transaction and the letters and promises of Mr. Jones prior to his letter of December 21, 1938, can not justly be disregarded.

After receipt of the letter quoted above, the Trustees obtained the new order (Court Order No. 102), in their petition setting forth in full Mr. Jones' letter quoted above (R., pp. 17-29; Brief, pp. 14-16). Immediately thereafter, they asked Mr. Jones to make reapplication of payments at the promised 4% rate; and in reply they received his final promise of December 21, 1938. From that time on, there followed the succession of seven other petitions, sales, and payments. These, along with their earlier petition by which Court Order No. 102 was obtained, constituted the "appropriate steps to render available to the RFC all sums realized . . ." as required by Mr. Jones.

These *effective* "efforts" constituted the "consideration" that Mr. Jones requested and the "action in reliance" that he expressly invited. They made enforceable and irrevocable the promise to accept interest at 4% in full satisfaction, a promise that the statutes of New York made enforceable without them, and a promise that ought to have been kept without regard to the statutes.

In the light of the facts of record in this case, facts never considered at all by the District Court, and facts as easily interpreted in this Court as in the Circuit Court of Appeals, it is immaterial whether or not New York accepts in full the doctrine of Sec. 90, Restatement, Contracts, that substantial action in reliance on a promise is ground for its enforcement. But there is ample reason for predicting that the New York Court of Appeals will accept and apply it. Its own decisions formed a part of the "available data" on which Professor Williston and his advisers and the American Law Institute based Sections 45 and 90 of the Restatement. The Court of Appeals will not abandon its own cases that paved the way for their adoption and will not disregard the Institute's action or the many cases elsewhere that have since approved and applied the stated rules.

As early as 1917, in *DeCicco* v. *Schweizer,* 221 N. Y. 431, the Court, speaking by Cardozo, *J.,* had enforced the philanthropic promise of father Schweizer to pay an annuity to his daughter Blanche, because four days later Blanche and Count Gulinelli got married in reliance on it. It so held, even though Blanche and the Count were already affianced and the wedding day set, and even though in the written promise of the father there was no request that the marriage should

be consummated as already agreed and no statement that it was regarded by him as a "consideration" for his promise.

In the *DeCicco* case there was no evidence that the parties married "in reliance" on the promise, other than the written promise itself and the fact that they got married on the day set. With sound common sense, using its own human experience, the Court drew its own inference. Cardozo said: "It will not do to divert the minds of others from a given line of conduct, and then urge that because of the diversion the opportunity has gone by to say how their minds would otherwise have acted. If the tendency of the promise is to induce them to persevere, reliance and detriment may be inferred from the mere fact of performance. The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others."

The respondent's brief cites *Allegheny College* v. *Nat. Chautauqua Co. Bank,* 246 N. Y. 369 (1927), as authority that "the doctrine of promissory estoppel is applied in New York only to charitable subscriptions". The word "only" is an unwarranted insertion; the decision is expressly made authority for the quoted statement with "only" omitted. The Court enforced a gratuitous promise of $5,000 to a college, payable at death, solely because the *promisor* had herself paid over $1,000 of that sum during her life and the college had received it, thereby becoming bound to hold it in trust for the purposes of the gift. This bound the donor's executor to perform the remainder of her promise. No Court has carried the "promissory estoppel" doctrine further than this.

After explaining how a "compendious formula" may be no more than a "half truth", Cardozo says: "The doctrine of consideration has not escaped the common lot. As far back as 1881, Judge Holmes in his lectures on the Common Law (p. 292), separated the detriment which is merely a consequence of the promise from the detriment which is in truth the motive or inducement, and yet added that the courts 'have gone far in obliterating this distinction'. The tendency toward effacement has not lessened with the years. On the contrary, there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled 'a promissory estoppel' (Williston, Contracts, §§ 139, 116). Whether the exception has made its way in this State to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say. Cases such as *Siegel* v. *Spear & Co.*, 234 N. Y. 479, and *DeCicco* v. *Schweizer*, 221 N. Y. 431, may be signposts on the road."

In *Martin* v. *Meles*, 179 Mass. 114 (1901), Holmes restated and applied his earlier analysis in an actual decision. A manufacturer who had subscribed $2,000 for use by a committee in defending patent infringement suits that might be brought was held bound to complete the payment because the committee had acted in reliance thereon. We have quoted from Holmes' opinion in our earlier brief. We shall add here only this: "This is not a subscription to a charity. It is a business agreement for purposes in which the parties had a common interest . . . There is the strongest reason for interpreting a business

agreement in the sense which will give it a legal support, and such agreements have been so interpreted." Further on he says: "If necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendants' obligation."

Respondent quotes *Lowrey* v. *Hawaii,* 206 U. S. 206, 222: "There is no surer way to find out what parties meant than to see what they have done." We respectfully call attention to the parts of the record showing all the things that the Trustees "have done", to the participation therein by RFC, to the brief filed by RFC with the Interstate Commerce Commission on August 1, 1939 (R., pp. 133-134, our first brief, pp. 17-19), and to the receipt and retention by RFC of all the cash payments.

Was the Circuit Court of Appeals justified in refusing to determine what law is applicable and to give effect to the New York Statute, because there had been no "intervening decision", or because of its "discretion"?

(Reply to respondent's argument numbered 3(a), page 13.)

In the *Hormel* case there had been an "intervening decision" clarifying the application of the statute (*Helvering* v. *Clifford,* 309 U. S. 331). Respondent does not assert that there had been such a decision in the four other cases in this Court cited in our brief; and there had been none. Nor had there been any in the many other cases that we have there cited.

The fact that a statute is obscure and doubtful may be an excuse for not understanding it; but the

fact that a statute is as clear as a vesper bell is not an excuse for not obeying it.

There had, indeed, been "no change in the law" since the decision of the District Court. But counsel for respondent are hardly justified in saying: "Section 33(2) was not new; apparently it was merely new to petitioner". It must also have been new to counsel for respondent, or they would not have asked the Circuit Court of Appeals to apply New York law in this case, without at the same time referring that Court to a statute constituting so important and so directly applicable a part of that law.

In *Glebe Sugar Ref. Co.* v. *Trustees,* [1921] 2 A. C. 66, the House of Lords reprimanded counsel for not knowing the applicable statute and calling it to the attention of all the Courts (there had been no intervening decision); but their admonition was not directed exclusively to counsel for the petitioner, and no party to the litigation was penalized for the shortcomings of counsel.

In refusing to determine what law is applicable and to give effect to the New York statute, the Circuit Court of Appeals was neither using nor abusing its "discretion". Neither the petitioner nor its counsel were singled out, either for egregious ignorance, for fraudulent concealment of the law, or for other inequitable conduct. In this case, it is RFC that is repudiating a written promise to the detriment of its co-creditors in bankruptcy, not the Trustees or the co-creditors, who are now the real petitioners. It is the Trustees who took the "appropriate steps" suggested by Mr. Jones; and it is RFC who is clinging to $800,000 in addition to the benefits received therefrom.

It is the Trustees and co-creditors whose position was changed in reliance, not RFC.

The Circuit Court of Appeals did not think its action was "discretionary". It said, "we may not reverse upon such a ground;" and it appended thereto citations of five cases as authorities requiring the refusal to reverse. The cases cited do not support the decision; and many other cases, as well as the *Hormel* case, are directly opposed to it.

Respondent repeats the broad general statement that "ordinarily an appellate court does not give consideration to issues not raised below." A statement so worded is quite incapable of being a "rule of decision" in any specific case; this is shown by the word "ordinarily". We repeat a sentence taken from our earlier brief: "the opinion in the *Hormel* case makes it perfectly clear that this general rule is not applicable with respect to decisive matters that could not have been obviated below, *especially overlooked statutes.*"

In the Circuit Court of Appeals the petitioner did not ask that its case should be tried "upon a different theory"—no more than did the respondent when it asked the Court to apply "the law of New York". The "theory" of the petitioner from the beginning has been that the promise of Mr. Jones was a binding promise by the law that is properly applicable to it; and the respondent's "theory" has been that it was not. This is not an "issue not raised below". The issue before all the Courts has been: Do the undisputed facts of record show that Mr. Jones made a binding promise?

Do counsel for RFC really doubt, and can this Court for a moment doubt, that the trustees for creditors "agreed" to the reduction of interest so many times promised?

(Reply to respondent's argument 3(b), brief, page 15.)

New York Pers. Prop. Law, § 33(2), provides, *in words,* that "An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration. . . ." Your petitioner regrets the apparent necessity of presenting the New York applications of so obvious and salutary a statute.

The New York courts have, indeed, wasted no time in speculating whether the word "mutual" should be added to a statute in which it does not appear, or whether a statute whose purpose is to *dispense* with a "consideration" also *requires* a consideration. But when, in cases of modification or discharge, the absence of "consideration" has been asserted, they have promptly and summarily applied this statute.

In the appendix to our earlier brief, page 84, we have already cited four such New York cases. We here expand our statement of them, because of the respondent's statement that "The section has not been interpreted by the New York courts in any manner pertinent here."

In re Wanninger's Estate, 34 N. Y. S. 2d 326 (1942). A claim for money lent, made in a proceeding for the settlement of an executor's account, was held to have been discharged by a mere personal letter of the creditor to the debtor. Surrogate Millard said: "The following letter, received in evidence, constituted

either a release and discharge of any obligation . . . (Subdivision 2 of Section 33 of the Personal Property Law) or cogent proof that such purported loans were actually outright gifts. . . ." The letter was a mere "unilateral declaration"; and not a word is said as to an expression of assent by the obligor.

Thompson v. *Willson,* 183 Misc. 949, 51 N. Y. S. 2d 665 (1944), aff'd 269 App. Div. 829, 56 N. Y. S. 2d 415, appeal dismissed 269 App. Div. 937, 58 N. Y. S. 2d 352. The defendant (the maker of a mortgage note payment of which had been assumed by a purchaser) asserted a discharge by reason of an extension of time given to the principal debtor. The creditor had merely written a *letter* extending the time. The Supreme Court said (page 666, 51 N. Y. S. 2d): "Nor is it relevant, since the enactment of subdivision 2 of Section 33 of the Personal Property Law in 1934, that the agreement to extend may be without consideration. There is no doubt that the *letter* of April 8, 1936, signed by the plaintiff, *constitutes such an agreement* to extend the time of payment." (Italics ours.)

Salinas v. *Salinas,* 187 Misc. 509, 62 N. Y. S. 2d 385 (1946), aff'd 67 N. Y. S. 2d 692. Immediately after the execution of a separation contract, the husband signed *a letter* saying: "I hereby . . . *agree* further that I shall make no assignment of such policy or change the beneficiary therein named, without your consent. This is to form part of the separation agreement this day entered into between you and me as if fully incorporated." This was enforced, Judge Shientag saying: "If the letter be deemed a modification at the time it was signed, the necessity for consideration no longer exists, under the provisions of § 33, subd. 2, of the Personal Property Law." The

husband's *letter* was not signed by the wife; and no allegation or proof of any expression of "agreement" by her appears. The words of the letter are those of the husband alone: "I hereby agree."

Spector v. *National Cellulose Corp.*, 181 Misc. 465, 48 N. Y. S. 2d 234 (1943), aff'd 267 App. Div. 870, 47 N. Y. S. 2d 311. A creditor's action for payment of a debt was thrown out, because he had in writing "agreed that payment would not be requested as long as the National Cellulose Corp. is in default on principal and interest payments to the RFC." Again, "he agreed to subordinate his claims to the debts owing by National to three other corporations." The exact form of his "agreement" is not quoted; but there is nothing to indicate that the debtor or RFC also "agreed".

The Court said: "Plaintiff makes the further allegation that those writings were executed without consideration. A sufficient answer to such allegation is a mere reference to Section 33 of the Personal Property Law dispensing with necessity for a consideration in certain cases, but it may also be observed that the agreements expressed in those writings clearly were for the benefit of RFC . . . and the other corporations named therein, and it is at least *a fair inference that all such beneficiaries changed their position upon the faith of the writings.*" (Italics ours.)

Apparently, in this case RFC's shoe was on the other foot. It is now asserting before this Court that the Trustees and the other beneficiaries did not change their position in reliance on its express (and often repeated) promise, even though in accordance with the expressly required condition thereof the

Trustees had made and RFC had received actual payments amounting to several millions of dollars.

A notification of acceptance by an offeree and an expression of his "agreement" to the terms of a promise made to him are made wholly unnecessary by the New York statute because it eliminates the necessity of consideration. In the statute itself, "agreement" means *promise;* and this always is "a unilateral declaration".

Application of Section 122 of the Negotiable Instruments Law, Cahill's N. Y. Cons. L., Ch. 39, § 203.

(Reply to respondent's argument numbered 4, brief, page 18.)

Every argument made by the petitioner with respect to N. Y. Pers. Prop. Law, § 33(2) is applicable to Section 122, N. I. L. The argument is strengthened by the fact that this latter section is the statutory law throughout the United States. Your petitioner's reliance on it is "belated"; but it is not too late to call attention to the fact that the Trustees and other creditors were from the beginning entitled to rely on it and that RFC was from the beginning bound by it.

The point on which this Court reversed in *Pecheur Lozenge Co.* v. *Nat'l Candy Co.,* 315 U. S. 666 (1942), was not even mentioned in the petition for certiorari. In *Murdock* v. *Ward,* 178 U. S. 139 (1900), the point was not made even in the assignments of error. In *Joint Council* v. *D. L. & W. R. Co.,* 157 F. 2d 417 (1946), the *Second Circuit* raised the point of its own motion and ordered the parties to file new briefs discussing it. In *Glebe Sugar Ref. Co.* v. *Trustees* [1921] 2 A. C. 66, the case went through three courts with-

out mention of the applicable statute. It was called to the attention of the Lords by one of their own number, after argument completed and judgment reserved.

Bank of U. S. v. *Manheim,* 264 N. Y. 45 (1934), is not inconsistent with the decisions cited and the argument made in our earlier brief. In a suit against an indorser on a note the defendant pleaded his discharge by virtue of an *oral agreement* based upon a sufficient consideration. The Court held that no such agreement had been made. Section 122, N. I. L., could not be used in defense because there was no writing. Even the dictum of the Court, quoted by respondent, is not inconsistent with petitioner's argument. The dictum is that "renunciation, unsupported by consideration, can be effected only by such a writing as demonstrates a present, absolute and unconditional intention to renounce." It is the expression of intention that must be "present, absolute and unconditional," not dependent in any way on a further expression by the holder himself or on a subsequent voluntary action of his own. That is why we have previously indicated that Mr. Jones' promise was not conditional on any further expression or action of his own; it was conditional only on action by the Trustees.

In the making of any contract, the expression of assent by either party must always be "present, absolute and unconditional"; but the contract itself, the rights and duties created by such an expression of intention, may be and usually are conditional on all sorts of events and performances. In *Mactier* v. *Frith,* 6 Wend. 103 (1830), Frith made an offer that Mactier should take over a joint adventure to his own sole account. When Mactier replied that war might break out between France and Spain, "in which case I will at once decide to take the adventure to my own ac-

count" and that "I shall delay coming to a determination", no contract was made thereby. His letter contemplated further expression by himself and was not a "present, absolute and unconditional" acceptance.

An intention to renounce or discharge must also be unconditionally expressed; but the renunciation or discharge itself may be conditional on later events or on performances to be rendered by the discharged party.

If the dictum means anything other than the above, it certainly is incorrect.

In *Leask* v. *Dew,* 102 App. Div. 529, aff'd without opinion 184 N. Y. 599, an action was brought by an executor on a promissory note, a note that he had found among the testator's papers. In the same envelope with the note was the following writing:

"To my Executors: The enclosed note I wish to be cancelled in case of my death, and if the law does not allow it I wish you to notify my heirs that it is my wish and orders. Oliver W. Buckingham."

This was held not to be an operative renunciation. Observe, however, that the writing merely expresses a wish that a discharge shall take place in the future, that it was never delivered to anybody, and that it remained in the possession of the writer and subject to his cancellation and destruction at any time.

Is a federal corporation like RFC bound, like the men with whom it does business, by the statutes and other commercial laws of the State in which the business is done? Is such a corporation bound, as other men would be, by contracts made with trustees in bankruptcy?

Counsel for respondent make the bare suggestion (Brief, p. 8) that "since the contract was with an

agency of the United States, it may be that federal law is controlling". In parenthesis, however, they say as to this federal law: "which we conceive to be the generally recognized common law as set forth in the Restatement of Contracts and accepted by the federal courts prior to *Erie R. Co.* v. *Tompkins,* 304 U. S. 64." This seems to have been everyone's assumption when the case was considered and determined by the District Court. But it was not on this theory that respondent argued in its brief in the Circuit Court of Appeals. It was there specifically contended that the case is governed by the law of New York, and that by that law the "estoppel theory of consideration" and the rules of Sections 45 and 90, Restatement, Contracts, are not recognized. In that court, your petitioner agreed with counsel for respondent that the law of New York is the governing law; but asserted further that Sections 45 and 90 are in accord with that law and that the statutory law of New York makes Mr. Jones' promise binding without the aid of any doctrine of consideration or of the Restatement.

When a corporation is organized by the United States to take part in business transactions with other people, in almost all instances the business is transacted within the boundaries of an individual State, with other corporations and individuals who are bound by the laws and customs of that State and who generally know no other. If, however, the Constitution, treaties, or statutes of the United States "provide" a common federal rule of decision for such cases, the local inhabitants must abide by the supreme law. Further, if the accomplishment of the purposes of Constitution, treaties, or statutes "re-

quires" the creation and application of a common federal rule of decision, that rule must be created and applied, whatever may be the court and whatever may be the case. This would be so, even if Congress had passed no Rules of Decision Act; and it is so in the federal courts without regard to the particular door by which the parties may enter the federal court house.

In determining whether a common federal rule of decision is "provided" by Constitution, treaty, or statute, or is "required" for the accomplishment of their purposes, the Supreme Court of the United States has the final word, within no limits other than those imposed by its own political wisdom and judicial self-restraint.

Staying well within those limits, the Court has thus far applied to the commercial transactions of federal corporations the rules of decision that are found in the "laws of the several States". This is true when the entering door has been diversity of citizenship; it is equally true when that door is an express provision in the organizing statute providing that the corporation may sue and be sued in the federal courts. Such a provision merely opens a special door into the federal court house; it is not a rule of decision governing the parties after they have entered. This is exactly what is expressly required by the Rules of Decision Act (Jud. Act 1789, § 34, 28 U. S. C. A. § 725); and so the Supreme Court has consistently held.

In *Bank of the U. S.* v. *Tyler,* 4 Pet. 366 (1830), the bank was assignee of a note made payable in Kentucky. A Kentucky statute allowed an assignee to sue

in his own name; and Kentucky decisions required of an assignee (for benefit of an indorser) a degree of diligence beyond that of other States or of the common merchant law. The *statute* permitted the federal Bank to sue in its own name; but it lost the case because its diligence was below the judicial standard of Kentucky.

In *Sowell* v. *Fed. Reserve Bank,* 268 U. S. 449 (1925), the Bank was authorized by statute to sue in a federal court. It sued there on a note payable in Texas. The rules of the Texas Negotiable Instruments Law were the rules of decision.

Moses v. *Lawrence Nat. Bank,* 149 U. S. 298 (1892). The statute of frauds of Alabama was held applicable to a suit on a negotiable note brought by a National Bank, the Court saying: "There can be no doubt that the statute of frauds, even as applied to commercial instruments, is such a law of the State as has been declared by Congress to be a rule of decision in the courts of the United States. Act of 1789, c. 20, § 34."

Erie R. Co. v. *Tompkins,* 304 U. S. 64 (1938) is merely an additional illustration, although the entrance door was "diversity of citizenship". The Court applied the Rules of Decision Act; but that Act is not restricted to cases entering through that door. The "epoch making" feature of the case is that it overruled the opinion of Story and his eight colleagues that "laws of the several States" did not include the unwritten judicial rules of decision. Story himself never doubted that the *statutes* of the several States were rules of decision in the federal courts "except where the Constitution, treaties, or statutes of the United States otherwise require or provide."

Therefore the rules of decision applicable to the contract loans of RFC and PWA to the Railroad Company, made and to be performed in New York City, are the rules, statutory and judicial, that are applicable to other men who transact business there.

The cases illustrated by *Clearfield Trust Co.* v. *U. S.*, 318 U. S. 363 (1943), are not opposed to the foregoing. They are merely cases within a narrow field in which the accomplishment of the purposes of the Constitution, treaties, and statutes "requires", as the Court believed, the application of a common federal rule. In *U. S.* v. *Standard Oil Co.*, U. S. , 67 S. Ct. 1604 (1947), the Court showed entire consistency, even though the common federal rule that it laid down operated against the Government instead of in its favor—the rule of decision being that the United States does not have a right that its individual citizens would have.

Do the Constitution, treaties, or statutes of the United States either provide or require a common federal rule of decision, different from the New York rules that were originally applicable to the contract loans herein, merely because the borrower subsequently became a bankrupt? Secondly, do they provide or require such a common federal rule with respect to a new transaction between the creditor and the trustees of the debtor in bankruptcy? Except within a limited field, the decisions of this Court require that the answer to both questions shall be a very confident No.

The Bankruptcy Act is one of those "statutes of the United States" that "provide" rules of decision. If the accomplishment of its purposes "requires" the judicial creation and application of other common fed-

eral rules contrary to the existing laws of a State, those rules also are the rules of decision in any case and in any court having jurisdiction of issues in which they are involved.

The words and purposes of the Bankruptcy Act undoubtedly provide and require a just and equitable distribution of assets among all claimants having valid claims. In *Vanston Bondholders Prot. Comm.* v. *Green,* 329 U. S. 156 (1946), the majority of this Court thought that what is a just and equitable distribution, in the classification and marshalling of claims, is not determined solely by the statutes and judicial rules of decision of the separate States. Probably the specially concurring Justices did not disagree with this. The Court said that the validity of a claim in bankruptcy "in the absence of overruling federal law, is to be determined by state law." The whole Court agreed that the creditor's claim to compound interest was invalid. It is to be noted that it was invalid by the law of New York *and therefore* would be invalid in bankruptcy.

Although in a rare case the Act may require the bankruptcy court to reclassify or even to refuse recognition to a claim that would be valid in a State, *it clearly does not require the court to validate a claim that would be invalid by the appropriate State law and to distribute to such a claimant assets that would otherwise go to other claimants.* This is clearly the rule of decision to be applied to the case in this Court between petitioner and respondent. A just and equitable distribution has not been effected in this case.

The claim of RFC to payment of the difference between 5 per cent and 4 per cent interest, amounting to more than $800,000, was invalid by the law of New York—the law that governed the loan con-

tract when it was made and governed its subsequent discharge, quite independently of bankruptcy. The invalidation of the interest reduction promise of Mr. Jones, a promise acted upon by the Trustees as desired by him and to the benefit of RFC, a promise made binding by the law of New York, was not just and equitable to the other claimants in bankruptcy. In the light of the history of the present transaction, the distribution that has been made would not be just and equitable, even if New York had never enacted Section 33(2) of its Personal Property Law or Section 122 of the Negotiable Instruments Law.

Any new contract made by the Trustees, either with a creditor or with an outsider, is subject to the control of the Bankruptcy Court. It must not be a breach of trust or detrimental to the trust estate. But it is no breach of trust for the Trustees to solicit or receive a release or discharge, in part or in full, from a creditor. His removing himself as a claimant to a distributive share of the assets can be nothing but beneficial to the other creditors and trust beneficiaries.

The Bankruptcy Act contains no provision or requirement, express or constructive, that a creditor shall not abandon his claim. Nor does it invalidate a release or discharge by a creditor, even though it is expressly made conditional on action by the Trustees, provided that action is supervised and approved by the Bankruptcy Court.

It would indeed have been a breach of trust for the Trustees to *promise* full payment in cash to RFC in the reorganization. No such illegal promise was asked by Mr. Jones or given by the Trustees. It would have been a breach of trust for the Trustees to sell a single security and pay over the proceeds to RFC, otherwise than by order of court, with full opportunity to other

claimants to object. This clearly shows that in obtaining orders of court as desired by RFC, in making the authorized sales, and in paying the proceeds to RFC, the Trustees were not merely performing a legal duty and RFC was not getting only that to which it was legally entitled.

There is no provision or requirement in the Bankruptcy Act for a common federal rule of decision with respect to the doctrine of consideration for a promise. The Civil Law of Louisiana has a very different test for enforceability of promises. Some States still enforce promises merely because they are sealed and delivered. Pennsylvania has provided by the Uniform Written Obligations Act that a written promise shall be enforceable if the writing in words declares that the promisor so intends. Alabama and a half dozen other States enforce promises to render a performance that was required by a strong antecedent moral obligation. New York provides that a written promise of modification or discharge shall not be invalidated by absence of consideration. All the States alike validate the written renunciation of a negotiable instrument. The Act does not require the Bankruptcy Court to disregard these and other variations in contract law and to create a common federal commercial law that shall apply to claims in bankruptcy. At the very least, there is no such requirement with respect to transactions the effect of which is merely to reduce the amount of a creditor's claim.

Respectfully submitted,

HERMON J. WELLS,
Attorney for Petitioner.

ARTHUR L. CORBIN, SR.,
H. H. CORBIN,
Of Counsel.